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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 729

JOSEPH SICILIANO,

Petitioner,

vs.

STATE OF ILLINOIS,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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Chicago, Ill.
Attorney for Petitioner.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LA KEVIEW 5-6581

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OPINION BELOW.

The opinion of the Supreme Court of the State of Illinois is reported in 4 Ill. 2d 581 and appears in the appendix.

JURISDICTION.

The judgment of the Supreme Court of the State of Illinois was entered on September 23, 1954. A petition for rehearing was allowed and upon a rehearing the judgment of the Supreme Court of the State of Illinois was reaffirmed on January 21, 1955.

The jurisdiction of this court is invoked under Rules 19 (1) (a) and (b).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the petitioner was denied due process of law and the equal protection of the law when the trial court disregarded the method provided for the selection of jurors by the Jury Commissioners Act of the State of Illinois, and directed the sheriff to select at his own discretion persons for jury service.

2. Whether the decision of the Supreme Court of the State of Illinois deprived the Petitioner of due process of law and equal protection of the law by holding that the Jury Commissioners Act did not provide a method for summoning jurors when the original panel is exhausted although section 9 of the Act expressly provides that if more jurors are needed a judge of the court shall so certify and they shall be drawn in the manner provided in the Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

UNITED STATES CONSTITUTION: Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 9 of the Jury Commissioners Act of the State of Illinois enacted in 1931 (Ill. Rev. Stat. 1953 Chap. 78, par. 52) provides as follows:

> "One or more of the judges of each court of record of the county or of municipalities within the county shall certify to the clerk of the court the number of petit jurors required each month. The clerk shall then repair to the office of the jury commissioners and there, in the presence of the persons mentioned in Section 8 of this Act, proceed to draw by lot the necessary number of names from those made available for such drawing as in Section 8 of this act provided. The clerk shall thereupon certify to the sheriff the electors whose names are so drawn, to be summoned according to law. If more jurors are needed during the month, a judge of the court shall so certify, and they shall be drawn and certified forthwith in the manner above provided. Whenever a grand jury is required by law or by order of the court, it shall be drawn and certified in like manner."

Section 13 of the Jurors Act of the State of Illinois, (pertinent portion substantially the same as enacted in 1874), (Ill. Rev. Stat. 1953, Chap. 78, par. 13) provides as follows:

> "When by reason of challenge in the selection of a jury for the trial of any cause, or by reason of the sudden sickness or absence of any juror for any cause, the regular panel is exhausted, the court may direct the sheriff to summon a sufficient number of persons having the qualifications of jurors to fill the panel for the pending trial, but upon objection by either party to the cause to the sheriff summoning a sufficient number of persons to fill the panel, the court shall appoint a special bailiff to summon such persons * * *."

STATEMENT.

Two indictments for bribery were returned by the Grand Jury of Lake County, Illinois, charging that the petitioner had given a food inspector twenty-five dollars for the purpose of inducing him to fail to make an inspection of meat products. A jury found the petitioner guilty and he was sentenced to a term of two to five years imprisonment. The Supreme Court of the State of Illinois affirmed the judgment of conviction, then granted a petition for rehearing and upon a rehearing reaffirmed the decision.

The facts material to the issues show that the Jury Commissioners Act was in effect in Lake County, Illinois. A panel of jurors selected by the Jury Commissioners was exhausted during the *voir dire* examination of the jurors in this case. The court, without notice to the petitioner directed the sheriff to bring in a special venire. The sheriff called a number of persons by phone to serve as jurors. Counsel for petitioner objected to the selection of jurors by the sheriff and challenged the array of the venire. (Rec. 3, page 3 of Abstract) The trial court denied the motion. The questions presented here were raised on assignment of errors in the record filed in the Supreme Court of the State of Illinois. (Rec. 3, page 83 of Abstract)

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ARGUMENT.

The Jury Commissioners Act of Illinois was passed in 1897 to remedy the evils that had arisen in the large communities by reason of an uncontrolled system of jury selection under the earlier act known as the Jurors Act. Prior to the passage of the Jury Commissioners Act there was considerable complaint about the caliber of the jurors and the method of selection and it was the obvious hope of the legislature that this new plan would remove the evils which resulted from the old system. It was conceived to promote the administration of justice by making it difficult to obtain hand picked jurors who, by fraud or deceit, would return a verdict favorable to one of the parties.

The State contended in the Supreme Court of the State of Illinois that it relied on Section 13 of the Jurors Act passed in 1874 which provided that when by reason of challenge in the selection of the jury the regular panel is exhausted, the court may direct the sheriff to select persons to fill the panel; and it was further contended that the Jury Commissioners Act did not provide a mode of calling jurors when the original panel was exhausted.

In answer to the contention of the State, counsel for the petitioner argued that the jurors in this case were selected in violation of section 9 of the Jury Commissioners Act under which it was mandatory for the trial court to certify to the jury commissioners the need for additional jurors. Furthermore, the trial court failed to comply with section 13 of the Jurors Act upon which the State relies by refusing to afford the petitioner the right to appoint a special bailiff to select jurors to fill the panel.

It is difficult to understand the construction given to the Jury Commission Act by the Supreme Court of Illinois in view of the broad language of section 9 of the Act which provides that if more jurors are needed a judge of the court shall so certify and they shall be drawn in the manner provided in the Act. It would have been superfluous to specifically provide in the Jury Commissioners Act that in the event of the panel becoming exhausted by reason of the exercise of challenges that additional jurors be summoned from the jury commissioners list. There is no logical reason why the legislature would provide for summoning jurors through the use of the jury commissioners list to fill the panel before a trial and rely on the sheriff under the archaic Jurors Act to fill the panel when it is exhausted. There would have been no purpose in passing the Jury Commissioners Act if it were meant to apply only to the original impaneling of the jurors. The plain and broad language contained in section 9 of the Act provided for the selection of jurors by the jury commissioners whenever additional jurors were needed.

Counsel for petitioner charged that the jurors selected by the sheriff were his cronies and the court admitted that the sheriff picked jurors whom he knew. (Rec. 3, Abstract p. 82) By the method used in this case it was possible for the sheriff, who is an adjunct to the prosecution, to bring in jurors who would lean in favor of the prosecution.

The Constitution of the State of Illinois guarantees a jury trial for every defendant in a criminal case if he desires it. (Article II, Section 5). The Jury Commissioners Act committed to the jury commissioners the duty of determining who of the electors of the county should be deemed qualified to decide the guilt or innocence of persons charged with a crime. If a defendant upon a criminal charge may be compelled, over his protest, to submit his cause to a jury selected by a sheriff who was empowered to select

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such persons as his judgment, convenience or desire might dictate; then the protection which the State Constitution and the statute were designed to afford is nullified, and meaningless, and he is thereby denied due process of law and the equal protection of the law.

The decision in this case by the Supreme Court of the State of Illinois is in conflict with many previous decisions wherein the court held that failure to comply with the provisions of the statute for the selection of jurors deprives the defendant of a jury trial as guaranteed to him by the law of the land. (*Healy* v. *State,* 177 Ill. 306; *People* v. *Boston,* 309 Ill. 78; *People* v. *Schraeberg,* 347 Ill. 292; *People* v. *Mankes,* 292 Ill. 435; *People* v. *Fudge,* 342 Ill. 574; *People* v. *Kirkpatrick,* 413 Ill. 595.)

In cases involving discrimination against negroes, women, and other persons whose names in certain states were regularly excluded from the jury list, this Court held that such an exclusion deprived the defendant in a criminal case of due process of law. (*Strander* v. *West,* 100 U.S. 303, p. 313; *Neal* v. *Delaware,* 103 U.S. 370; *Gibson* v. *Mississippi,* 162 U.S. 565; *Carter* v. *Texas,* 177 U.S. 442; *Rogers* v. *Alabama,* 192 U.S. 226.) See also American Law Reports, Annotated, 52 A.L.R., p. 920.)

Likewise, due process was denied to the petitioner in the instant case, because he was entitled by law to have the names of the extra jurors drawn as provided in the Jury Commissioners Act. There is little distinction in principle between our present case and the foregoing cases where names were purposely withheld from a list which this court held to be a violation of due process.

CONCLUSION.

The questions raised in this petition are important to every litigant who desires a jury trial in those counties in the State of Illinois where the Jury Commissioners Act

is in force. If a sheriff may decide who shall serve as jurors without complying with the standards set up by the Act, then every litigant is subject to being forced to accept a jury already biased or prejudiced against him. The petitioner in this case was entitled to be judged by a fair selection of persons qualified to serve as jurors, not by friends of the sheriff who is an adjunct of the prosecutor's office. Under the system employed in this case, a jury could be so manipulated that a defendant in a criminal case would have little chance for a decision on the evidence in the case.

We respectfully submit that the petitioner was deprived of due process of law and the equal protection of the law and that the petition for writ of certiorari be allowed.

Respectfully submitted,

CHARLES A. BELLOWS
Attorney for Petitioner.

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APPENDIX I.

Opinion of the Supreme Court of Illinois.

MR. JUSTICE FULTON delivered the opinion of the court:

Plaintiff in error, Joseph Siciliano, was charged with the crime of bribery in two separate indictments returned by the grand jury of Lake County. By agreement the causes were consolidated and tried together. A jury in the circuit court of Lake County found the plaintiff in error guilty of bribery in manner and form as charged in both indictments, his motions for a new trial, in arrest of judgment, and for release upon probation were denied, and the court sentenced the defendant to imprisonment in the Illinois State Penitentiary for a term of not less than two years nor more than five years in each case, the sentences to run concurrently. Several assignments of error are presented for consideration here, including the contention that the evidence does not sustain the convictions and that the People failed to prove the defendant guilty of the crimes charged beyond a reasonable doubt. Attention will first be given to that phase of the case.

The first indictment charged that plaintiff in error gave one Harold Evans, an inspector of the Division of Foods and Dairies of the Department of Agriculture of the State of Illinois, the sum of $25 on January 5, 1951, to induce Evans, a public officer, to fail to perform his sworn duty in connection with the inspection of certain meat products, to allow and permit the illegal sale of meat products, to-wit, adulterated beef to be sold and dispensed as beef, and to keep and protect plaintiff in error from arrest and punish-

ment for the unlawful sale of adulterated beef. The second indictment charged that plaintiff in error gave Evans $25 on February 15, 1951, to induce Evans to fail to perform his sworn duty in connection with the inspection of horsemeat to be sold as beef, and to keep and protect plaintiff in error from arrest and punishment for the unlawful sale of horsemeat falsely represented as beef.

The principal proof to sustain these charges was the testimony of Harold Evans, a reluctant witness, who testified only after he had claimed his privilege against self incrimination and had been granted immunity by the court under section 35 of division I of the Criminal Code. (Ill. Rev. Stat. 1953, chap. 38, par. 82.) The testimony of Evans was not contradicted by the defendant, who elected not to take the stand. Evans testified that during the period from late 1949 to January of 1952 he was employed by the Division of Foods and Dairies of the Department of Agriculture of the State of Illinois as an inspector. As such inspector it was his duty to inspect any premises where food was produced or sold in the counties of McHenry and Lake. In connection with the performance of his duties he was not only supposed to examine the establishments for cleanliness but was required to pick up samples of the products involved for inspection and send them to the Chicago office of the Department for analysis. In late 1949 it appears that one Warren Knorr operated a meat packing and processing plant near Lake Zurich in Lake County known as the Central Market and Provision Company. Evans had inspected this plant in 1949. In December of 1949 Evans and Knorr were together in a tavern in Lake Zurich when plaintiff in error came there and advised Evans that he proposed to go into the horsemeat business in the plant theretofore operated by Knorr. Evans said plaintiff in error then stated that it could be a big operation; that witness would be paid well for what he did and

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that he asked Evans to "go along with him." On this occasion Evans says that Siciliano slipped a $20 bill into his package of cigarettes, which Evans kept, although he told plaintiff in error he was not interested.

It further appears from Evans's testimony that thereafter Siciliano and others did operate the meat processing plant near Lake Zurich under the name of Lake County Packing Company. Plaintiff in error and Evans had several meetings, on which occasions it appears that Evans was sought out by plaintiff in error. In explaining to Evans what he contemplated doing, plaintiff in error told him that they could use horsemeat blended with beef, cod fat, etc., to make ground hamburger. Evans testified that he met plaintiff in error in a restaurant in Wauconda on January 5, 1951, at which time John King and Tony Rossi, associates of Siciliano, were present; that on this occasion there was further conversation about the business and that plaintiff in error gave Evans $25. Further testimony relates a meeting in the same restaurant in mid-February of 1951, at which time plaintiff in error again talked about his business and gave Evans $20 or $25. Only Evans and Siciliano were present. Evans detailed other meetings and conversations which indicate more or less continuous contact between him and plaintiff in error.

Evans testified that as a result of these meetings he took no food sample from Lake County Packing Company in 1951 and made no reports on Siciliano or the Packing Company, though during this same period he visited the Lake County Packing Company on several occasions, inspected it for cleanliness and saw meat products there including what appeared to be sausage and hamburger. During the same interval he visited other meat packing and processing plants in Lake and McHenry counties from which he gathered meat samples in connection with the

performance of his duties as an inspector. It further appears that in 1949, prior to its operation by plaintiff in error, witness had visited the same plant and taken samples for analysis. The testimony of Evans as to his duties as inspector was corroborated by Christopher Beebe, chief chemist for the Division of Foods and Dairies and Evans's superior. Beebe testified that it was the duty of an inspector of the Department to inspect food establishments and pick up samples and follow them through as a witness in court when cases came to court. Beebe also testified, when later recalled by counsel for plaintiff in error, that it was not unlawful to slaughter horsemeat in the State of Illinois nor was it unlawful to process it and combine it with beef as long as there was no misrepresentation, but that it was unlawful to mix horsemeat with beef and represent it as hamburger, since hamburger is defined as ground beef with spices not to exceed 30 percent fat and does not provide for the presence of horsemeat. If sold and distributed as hamburger it must contain beef and spices only.

The gist of the offense of bribery is the giving to and receiving or accepting money or other valuable thing by a public officer to influence him with respect to the performance of his official duty. (*People* v. *Patillo,* 386 Ill. 566.) In proving the charges laid in the indictments it was incumbent upon the People to prove that Evans was a public officer; that money or other valuable thing was given by plaintiff in error to Evans and accepted by him and that the payments were for the purpose of influencing him in the performance of his official duties. The fact that the payments were made as testified by Evans is nowhere denied nor is it denied that at the times in question Evans was a public officer charged with the duties as set forth above. But plaintiff in error contends that the evidence

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falls short of proving that the payments were made to influence Evans in the performance of those duties, particularly in view of the fact that there was no evidence of any specific agreement by Evans to do or to refrain from doing anything relating to the duties of his office. Though there is no evidence of a specific agreement between Evans and plaintiff in error it seems abundantly clear that the payments made to Evans and accepted by him were calculated to influence him and that they accomplished their purpose as indicated by the uncontradicted evidence that no food samples were taken from the plant and no reports made. This, coupled with the testimony that plaintiff in error asked Evans to go along with him and told him he would be paid well for what he did, makes out a clear case of bribery. It is not suggested that plaintiff in error could have had any other reason for making payments of any sort to Evans, and the testimony of Evans that the payments were, in fact, made stands uncontradicted. The weight and credibility of that testimony were matters for the jury. If believed by them, it was ample to establish, beyond a reasonable doubt, the charges laid in the indictments. This court will not substitute its opinion for that of the jury unless it appears from a consideration of all the testimony that there is a reasonable doubt of the guilt of the accused or that the verdict is the result of passion or prejudice. *People* v. *Ulrich,* 411 Ill. 316; *People* v. *Hinderhan,* 405 Ill. 435.

During the course of the trial the regular panel of jurors which reported to hear the case became exhausted by reason of challenges, and the court, following the provisions of section 13 of the Jurors Act, (Ill. Rev. Stat. 1953, chap. 78, par. 13,) ordered the sheriff to summon ten additional persons to report as prospective jurors. This was first discovered by counsel for plaintiff in error when examining some of the jurors summoned in this manner

upon *voir dire,* and he immediately challenged the array of the supplemental panel on the ground that the court should have directed the clerk to draw the names of any additional jurors needed, relying on the provisions of sections 8 and 9 of the Jury Commissioners Act. (Ill. Rev. Stat. 1953, chap. 78, pars. 31 and 32.) The court denied the challenge. It is conceded that Lake County has a population large enough to require it to operate under the Jury Commissioners Act insofar as the provisions of that act apply, but counsel for the People contend that the act last mentioned contains no provisions dealing with the situation arising when the regular panel becomes exhausted by reason of the exercise of challenges during a trial; that the only statute dealing with that contingency is section 13 of the Jurors Act, which provides that the court shall direct the sheriff to summon a sufficient number of persons having the qualifications of jurors to fill the panel when the regular panel becomes exhausted by reason of challenges. The Jury Commissioners Act was not amendatory of the earlier Jurors Act but must be regarded as merely supplemental legislation. (*People* v. *Johnson,* 2 Ill. 2d 165.) There is no provision in the Jury Commissioners Act which is designed to supersede section 13 of the Jurors Act. Section 9 of the Jury Commissioners Act, which provides for the manner of summoning jurors if more are needed during the month, was not designed to meet the contingency arising when the regular panel becomes exhausted due to challenges during actual trial, but rather to provide a method of insuring a full panel at the start of any given case, and is comparable in its scope and purpose with section 8 of the Jurors Act. (Ill. Rev. Stat. 1953, chap. 78, par. 8.) It is our conclusion that the court properly followed section 13 of the Jurors Act in summoning additional jurors and that in any event the plaintiff in error was not prejudiced by the procedure followed.

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The State called several witnesses who, in the presence of the jury, refused to testify on the ground that their testimony might incriminate them. This was true of the principal witness, Evans, who was granted immunity as heretofore related. It was also true of witnesses Charles Wray, Nick Katsis, and John Lazar, all called by the People. Counsel for plaintiff in error takes the position that it was reversible error to permit the State's Attorney to call witnesses who, in the presence of the jury, refused to testify on the ground that their testimony might incriminate them. It is difficult to see how the court, in the orderly conduct of the trial, could possibly anticipate what witnesses may claim constitutional immunity. If counsel for plaintiff in error is correct in his theory, then it would be incumbent on any court hearing testimony in a criminal case first to hear all the testimony of each witness in chambers before permitting him to take the witness stand and testify before the jury. For how could it be determined in advance at what point in his testimony, if at all, a witness might claim his privilege other than by hearing his entire testimony? We know of no cases and none are cited holding that the fact that a witness claims privilege against self incrimination in the course of his testimony *ipso facto* constitutes reversible error. The record before us shows that the trial court was careful to examine the witness out of the presence of the jury once constitutional privilege was claimed. In the case of Evans, immunity was granted, and he thereafter testified willingly. The jury was fully instructed on this procedure, as well as to the effect that claim of privilege by any witness was not to be taken as any evidence of guilt of the defendant. No error is claimed in these instructions. When the witness Wray claimed privilege, the court then examined him out of the presence of the jury and suggested that the witness be withdrawn temporarily. He was never recalled by the

People. After several preliminary questions the witness Nick Katsis claimed constitutional privilege and the court immediately examined him out of the presence of the jury. This examination developed that Katsis, a truck driver, had hauled meat for the plaintiff in error and the court ruled that since the testimony showed that the most he could be charged with was a misdemeanor and since the time had elapsed during which such a charge could be brought, his claim was not well taken. Witness then proceeded to testify further before the jury. The witness Lazar claimed his privilege on the ground that he was then under indictment in Lake County and the court immediately excused him. Counsel for plaintiff in error relies on the case of *People* v. *Ben[illegible]*, 413 Ill. 601, to sustain his position in this respect. But the facts of that case are not at all like those in the case now before us. In that case one charged in the same county with having participated in the same crime with the defendant, though separately indicted, was called as a witness by the People and repeatedly questioned as to the details of the alleged crime. He was compelled again and again in the presence of the jury to claim his constitutional privilege and the State's Attorney was able to suggest by implication, insinuation and innuendo that witness and defendant had committed the crime for which defendant was on trial. The record before us shows that the trial court did everything within reason to protect the rights of witness and defendant once the constitutional privilege was claimed. We cannot predicate reversible error on the mere fact that at some point in their testimony certain witnesses objected to testifying on the ground that their testimony might incriminate them.

During the course of his testimony, the witness Nick Katsis, at the request of the State's Attorney, was called as a court's witness, after which the State's Attorney was

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permitted to cross-examine him. This is also assigned as error. Katsis was called as a court's witness only after the witness had manifested a most remarkable lapse of memory. Plaintiff in error contends that the court erred in its action because Katsis was not an eyewitness and because his testimony was not material to the issues. The power of the court to call witnesses is not limited to the calling of eyewitnesses. (*People* v. *Gibson,* 385 Ill. 371, 381; *People* v. *Touhy,* 361 Ill. 332, 349-350.) The court may call a witness for whom the State's Attorney cannot vouch where it is shown that otherwise there might be a miscarriage of justice. (*People* v. *Bennett,* 413 Ill. 601; *People* v. *Laster,* 413 Ill. 224.) Though little or no information was obtained from Katsis, the questions were certainly material to the issues, for they related to the delivery of adulterated meat sold as hamburger and under the second indictment it was competent for the People to prove that the defendant had engaged in the sale of horsemeat represented as beef. The record shows that a proper foundation was laid for calling Katsis as a court's witness. (*People* v. *Curran,* 286 Ill. 302, 311.) Katsis' answers to questions first propounded were very evasive and the court was also advised that Katsis had made contrary statements before the grand jury. In any event the record discloses that Katsis said nothing more detrimental to plaintiff in error while testifying as a court's witness than he did when testifying as an ordinary witness for the People. The failure of his memory remained practically complete. Under the circumstances plaintiff in error was not prejudiced.

Counsel for the People rested his case at 2:00 o'clock in the afternoon on the second day of the trial after calling only eight of the more than seventy witnesses listed as possible. Counsel for plaintiff in error then requested an adjournment until the following morning stating that he had subpoenaed several witnesses but none were present

to testify at that time. The court expressed its unwillingness to adjourn at such an early hour. It developed that the witnesses to be called were character witnesses and counsel for plaintiff in error finally agreed that he would go along with the court if counsel for the People would stipulate that the named witnesses would testify to the good character of the accused if called. Counsel for the People agreed and counsel for plaintiff in error then addressed the jury, naming the witnesses, giving their occupations, and stating that it had been stipulated that if called they would testify to defendant's good character. Counsel for plaintiff in error then announced that he had no further proof and rested his case. The balance of the afternoon was consumed in the preparation of instructions. The following morning, prior to arguments, counsel for the plaintiff in error moved to reopen the case on the ground that he had additional character witnesses and one whose testimony might be in the nature of an alibi. The court denied the motion. This is assigned as error. Whether a case may be reopened for further evidence rests in the sound discretion of the trial court and it will not be interfered with unless clearly abused. (*People* v. *Kelly,* 378 Ill. 273; *People* v. *Lukoszus,* 242 Ill. 101.) The record before us shows that the statement made by counsel to the court was not sufficient to motivate the court to reopen the case, and the court did not abuse its discretion in refusing to do so.

Plaintiff in error tendered an instruction to the effect that the jurors should not be in any way influenced, nor their decision affected, by newspaper stories that may have come to their attention; that they should disregard such matters and decide the case solely on the sworn evidence coming from the witness stand. This instruction was refused. The record does not show the content of any newspaper story concerning the case, and we are unable to say

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that the instruction requested was necessary. Other instructions given were ample to direct the jury that the verdict must be based only upon the evidence and the law applicable thereto.

Careful consideration has been given to the contention that plaintiff in error was prejudiced by certain remarks and conduct of the trial judge. We have examined the record in all particulars mentioned and find that the argument is without merit. In view of the obvious reluctance of certain of the witnesses and the difficulties encountered, it may fairly be said that the court manifested commendable restrain.

The judgment of the circuit court of Lake County is affirmed.

Judgment affirmed.

PER CURIAM: After allowance of a petition for rehearing on November 15, 1954, this case has been reconsidered and the foregoing opinion is reaffirmed and readopted.

APPENDIX II.

JUDGMENT.

January 21, 1955

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Lake County aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things assigned for error.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this

SEAL day of 19

.....Clerk,
Supreme Court of the State of Illinois.

APPENDIX III.

ORDER.

This matter coming on to be heard on motion of Joseph Siciliano, plaintiff in error, by Charles A. Bellows, his attorney, that the mandate in the above entitled cause be stayed until the petition for writ of certiorari has been passed on by the Supreme Court of the United States, and the undersigned being fully advised in the premises;

It Is Hereby Ordered that the mandate in the above entitled cause be stayed until such time as the petition for writ of certiorari has been passed on by the Supreme Court of the United States.

Enter:

/s/ Walter V. Schaefer
Justice of the Supreme Court
of Illinois

Dated: January 31, 1955

APPENDIX IV.

Section 9 of the Jury Commissioners Act (Ill. Rev. Stat. 1953, Chap. 78, para. 32):

> "One or more of the judges of each court of record of the county or of municipalities within the county shall certify to the clerk of the court the number of petit jurors required each month. The clerk shall then repair to the office of the jury commissioners and there, in the presence of the persons mentioned in Section 8 of this Act, proceed to draw by lot the necessary number of names from those made available for such drawing as in Section 8 of this act provided. The clerk shall thereupon certify to the sheriff the electors whose names are so drawn, to be summoned according to law. If more jurors are needed during the month, a judge of the court shall so certify, and they shall be drawn and certified forthwith in the manner above provided. Whenever a grand jury is required by law or by order of the court, it shall be drawn and certified in like manner."

APPENDIX V.

Section 13 of the Jurors Act (Ill. Rev. Stat. 1953, Chap. 78, par. 13):

> "When by reason of challenge in the selection of a jury for the trial of any cause, or by reason of the sudden sickness or absence of any juror for any cause, the regular panel is exhausted, the court may direct the sheriff to summon a sufficient number of persons having the qualifications of jurors to fill the panel for the pending trial, but upon objection by either party to the cause to the sheriff summoning a sufficient number of persons to fill the panel, the court shall appoint a special bailiff to summon such person. * * *"

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 729

JOSEPH SICILIANO,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

I.

It is argued by the respondent that the petitioner did not assert that he had been deprived of a federal right. The petitioner at the first opportunity in the trial court challenged the array of the jurors brought in by the sheriff contrary to the Jury Commissioner's Act. In the Supreme Court of the State of Illinois the petitioner claimed that he was deprived of a trial by a jury according to the laws of the State of Illinois. (See petition for Rehearing). The petitioner's contention that he was deprived of the right to a fair selection of the jury was tantamount to a claim that he was denied due process of law. The trial

of the petitioner under circumstances where he was forced to accept such bystanders as were summoned by the sheriff to fill the panel, cannot be consonant with due process. Such choice can hardly be said to insure a defendant the fair, impartial jury guaranteed by the federal constitution and the state constitution of Illinois. It was a cardinal rule at common law that jurors to be qualified as impartial should stand indifferent between the parties and be wholly free from even the suspicion of bias. This must be so if the constitutional guarantee of a trial by jury is to be had.

The case of *Edelman* v. *California,* 344 U.S. 357, cited by the respondent in support of their contention is distinguishable from our present case in that in the former case no objection was raised to the constitutionality of the vagrancy statute in the trial court and the question was raised for the first time on appeal. We believe that the petitioner in our case without directly quoting the due process clause of the Federal Constitution raised the question in the trial court and in the Supreme Court of the State of Illinois.

This court has even considered matters not raised in the courts below when failure to do so would defeat the ends of justice. See *Terminello* v. *City of Chicago,* 337 U.S. 1.

II.

It is contended by the respondent that the petitioner did not claim that any prejudice resulted to him by reason of the sheriff's action in summoning bystanders to serve as jurors. We confess that we do not understand this argument. The petitioner has always maintained that the selection of jurors who were described as "cronies" of the sheriff deprived him of a fair and impartial jury. The petitioner contended in the trial court and before the Supreme Court of the State of Illinois that inasmuch as the sheriff is an adjunct of the prosecutor's office, he

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would most likely call those persons whom he knew would favor the prosecution. The failure to select jurors from the jury commissioners list was not a mere technical failure to follow the requirements of the statute. There was no attempt made to follow the provisions of the Jury Commissioners Act to select additional jurors. The method employed by the court in this case permitted the sheriff to select jurors who would be hostile to the defendant. The failure to comply with the Jury Commissioners Act lends itself to abuse since it is likely that the prosecution would be the recipient of the special influence of the sheriff in the selection of the jury.

The petitioner was prejudiced in that he had a right to be tried by a jury selected by the jury commissioners and not by "cronies" of the sheriff.

The respondent cites the case of *Fay* v. *New York,* 332 U. S. 261, which sustained the selection of a "blue ribbon" jury. It is obvious that there is no similarity between our case and the *Fay* case. The petitioner in our case was deprived of the selection of a jury as required by the Jury Commissioners Act, whereas in the *Fay* case the jurors were selected by the administrative officials charged with the duty of preparing jury panels.

CONCLUSION.

In view of the importance of the question whether the decision of the Supreme Court of the State of Illinois may deprive every litigant of the State of Illinois due process of law by depriving him of the right to a fair sampling of jurors under the Jury Commissioners Act, the petition for a writ of certiorari should be allowed.

Respectfully submitted,

CHARLES A. BELLOWS,
Attorney for petitioner.

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HAROLD B. WILLEY

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I.

This Court Is Without Jurisdiction of This Cause.

In an attempt to comply with rule 23(f) petitioner states "the questions presented here were raised on assignments of errors in the record filed in the Supreme Court of Illinois." (Rec. 3, p. 83 of Abstract.)

Examination of page 83 of the abstract will show that no federal question was raised by petitioner and that the statement in the petition is erroneous. An examination of the record will show that neither in the trial court nor in the Supreme Court of Illinois did petitioner assert any federal question upon which the judgment and conviction must be set aside and a new trial granted. It should be noted that following the judgment of affirmance by the

Supreme Court the petitioner sought and obtained a rehearing in that court. The petition for rehearing contained in the record filed in this court discloses no assertion that Illinois deprived petitioner of a federal right.

Petitioner failed to give Illinois courts the opportunity to consider any federal question. Such failure is fatal to the petition here. This court is without power to decide whether constitutional rights have been violated when federal questions are not seasonably raised. (*Edelman* v. *California*, 344 U. S. 357.)

This is not a cause wherein a defendant has been convicted without an adequate defense. The record discloses that petitioner's counsel participated in every step of the proceedings in which petitioner was convicted and of the review of those proceedings. Further it has been noted that counsel for petitioner is a highly experienced and extremely able counselor in criminal matters. (*People* v. *Ephraim*, 411 Ill. 118, 122.)

II.

Petitioner Was Not Deprived of Equal Protection of the Law.

As petitioner points out, Illinois provides for jury commissioners in larger counties. (Ill. Rev. Stat. 1953, chap. 78, par. 24-35 inclusive.) The Jury Commissioner's Act is not in lieu of but is supplementary to the general statutes relating to the selection of jurors in Illinois. (*People* v. *Nordel*, 414 Ill. 375, 379.)

The general statute on jurors which has been in force since February, 1874 specifically authorizes the Sheriff to summon a sufficient number of persons to fill the panel *for the pending trial.*

Admittedly this was the procedure followed by the trial

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court when petitioner was convicted. Nowhere does petitioner assert that any prejudice resulted to him as a result of the Sheriff's action in summoning bystanders.

Petitioner has never asserted and cannot assert that the jury commissioners failed to draw an adequate panel or that the panel as prepared by the jury commissioners discriminated against any person or class thereof. The decisions of this court cited by respondent are not in point and need not be discussed.

In *Fay* v. *New York*, 332 U. S. 261, this Court sustained a New York "blue ribbon" jury, in the selection of which the discretion of administrative officials charged with the duty of preparing jury panels wast exercised. Selection of jurors by the sheriff was the original common law mode of finding a jury. Unless it can be shown that the administrative official acted as a result of conscious bias, and discretion in selecting jurors is not bias unless that selection is used with a view of producing a particular verdict or with a view of excluding members of a particular racial, religious, political, economic or other group, there is nothing unconstitutional about the method whereby petitioner's jury was selected.

Conclusion.

In view of the foregoing, it is respectfully submitted that this is not a case in which the court should issue its discretionary writ of *certiorari*.

Respectfully submitted,

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